85-1558

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EMPIREGAS, INC. OF ARDMORE,
Petitioner,

v.

VERNON HARDY AND LINDA GAIL COFFMAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Is a verdict in state court based upon fraudulent representations regarding the merger of Empire, Inc. and Exco void as against public policy pursuant to the Employee Retirement Income Security Act (ERISA) where facts of case rise from a qualified pension plan?

2. Is a state court verdict awarding punitive damages void when contrary to applicable federal substantive laws that specifically exclude punitive damages?

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VERNON HARDY AND LINDA GAIL COFFMAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Empiregas, Inc. of Ardmore hereby petitions for a Writ of Certiorari to the Supreme Court of Alabama, enabling the Court to review the Judgments in *Vernon Hardy v. Empiregas, Inc. of Ardmore and Linda Gail Coffman v. Empiregas, Inc. of Ardmore,* (SC 84-834 and SC 83-1102) (decided November 8, 1985).

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is not officially reported and is reprinted as Appendix A to the Petition. The Judgments of the Circuit Court of Limestone County are not officially reported and are reprinted as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Alabama for the October term, 1985-86 was issued on November 8, 1985. (Appendix A).

On December 20, 1985, the Supreme Court of Alabama issued its Order denying Application for Rehearing. (Appendix C). This court has jurisdiction pursuant to 28 U.S.C. 1257 (3).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted in Appendix D.

STATEMENT OF THE CASE

Plaintiffs (Respondents in this Court) brought suit against Defendants (Petitioner) alleging fraudulent inducement concerning an employment contract executed by each of them as a condition of employment with Defendant and fraudulent inducement to give proxy for voting of shares in connection with proposed merger of Empire, Inc. with another corporation. [1]The separate cases filed in Limestone County, Alabama were consolidated for trial and the Jury found in favor of both Plaintiffs on all counts assessing compensatory damages, in total, of $19,870 and punitive damages, in total, of $100,492. Defendant appealled unsuccessfully to the Supreme Court of Alabama from these verdicts, said verdicts being affirmed on November 8, 1985. Application for rehearing was denied on December 20, 1985, and here Defendant seeks review of these Judgments by this Court.

Defendant raised numerous objections to the submission of a question to the Jury allowing for the award of punitive damages in this case. Further, on its Motion for Directed Verdict, Defendant asserted again that an award of punitive damages in this case would be improper and if the Plaintiffs were entitled to any damages, they would be compensatory in nature. While specific arguments relative to application of the Employee Retirement Income Security Act in this case were not made at trial nor on appeal to the Supreme Court of Alabama, Petitioner asserts that such argument is allowable here as provided in 14 CJS Section 149, which states in pertinent part:

> "The general rule that objections not raised below will not be considered on review is subject to modifications that errors complained of will be considered on review on Certiorari, although not raised below, where they involve questions of public policy, or a rule of substantive law..." 14CJS Section 149.

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[1]*Empire, Inc. was a party defendant in this case, but was released by the Circuit court after showing it did no business in Alabama.*

These exceptions are supported by *Dodd v. Una* and others, 5 ATL. 155, and *Massachusetts National Bank v. Shinn*, 57 N.E. 611. In *Dodd*, the Court of Errors and Appeals of New Jersey held that, "...unless Appellant is prevented by his conduct from raising the question, the jurisdiction of the Court of Chancery to make the original order may be reviewed." *Dodd*, page 160. In *Massachusetts National Bank v. Shinn*, the Court of Appeals of New York held that "where an appeal involves a question of grave public policy, the people are indirectly parties to it, and their interests should be looked after by the courts, even when the party who might have objected is silent."

REASONS FOR GRANTING THE WRIT

The Employee Retirement Income Security Act of 1974 (Public Law 93-406, Title 1, Section 514(a) states the following:

> "(a) Except as provided in (b) of this section, the provisions of this chapter and subchapter 3 of this chapter shall supercede any and all state laws insofar as they may now or hereafter relate to any employment benefit plan described in Section 1003(a) of this title and not exempt under Section 1003 (b) of this title. This section shall take effect on January 1, 1975." 29 USC 1144

This section of the act clearly preempts relief under state statutes, including common law fraud, which was the verdict of the Jury and affirmed in the Alabama Supreme Court. Such action by the Alabama Courts clearly attacks Public Law 93-406 (ERISA) and the preemptive provisions of that act as to state law remedies. Petitioner contends that this is a departure from public policy, and, therefore, is reviewable by this court. *Ribnik v. McBride*, 48 S.C. 545, 277 US 350, 720 L.ED.913.

In support of Petitioner's argument that this Court should review these decisions from Alabama as a matter of concern for public policy, we refer to the U.S. Code Congressional and Administrative News, Volume III, for the 93rd Congress, Second Session, 1974, Page 4898, II, "REASONS FOR THE BILL" which states,

> "One of the most important matters of public policy facing the nation today is how to insure that individuals who have spent careers in useful and socially productive work will have adequate income to meet their needs when they retire."

In Senate report Number 93-127 the committee on Labor and Public Welfare in its consideration of Senate Bill 4, stated the following:

> "The policy statement in Section 2 was most significant in that it recognized that all of the problems in the private pension field surfaced by the committe were so interrelated that they cannot be resolved without a comprehensive legislative program, dealing not only with malfeasance and maladministration in the plans, or the consequences of lack of adequate vesting, but also with the broad spectrum of questions such as adequacy of funding, plant shut-downs and plan terminations, transferability of vested credits, adequate communiction to participants and, in short, the establishment of certain minimum standards to which all private pension plans must conform if the private pension promise is to become a reality rather than an illusion." (U.S. Code Congressional and Aministrative News, Volume III, 92nd Congress, Second Session, 1974, Page 4851.)

Contained in the same committee report at page 4871, Title IV - ENFORCEMENT, we find the following comments:

> "The enforcement provisions have been designed specifically to provide the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of the Retirement Income Security for Employees Act as well as the amendments made to the Welfare and Pension Plan Disclosure Act. The intent of the committee to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants."

> "*Except where plans are not subject to the Retirement Income Security for Employees Act or the Welfare and Pension Plan Disclosure Act, and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the committee believes it is essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct and for creating a single*

reporting and disclosure system in lieu of burdensome, multiple reports." (Emphasis supplied) (Ibid, p. 4871)

Considerations of public policy here are clear, that if state courts are allowed to circumvent the spirit and letter of ERISA, the integrety of private pension plans throughout the land are in jeopardy. Congress clearly intended that jurisdiction over disputes arising out of activities concerning a qualified plan be vested in the federal courts. Congress was so specific in the act that it limited recovery by plan participants for acts of misconduct, including fraud, to recovery of benefits due under a plan, and specifically excluded recovery of punitive damages as might traditionally be available in actions for fraud.

Be it not sufficient that Petitioner's arguments here concerning violations of provisions of ERISA warrant review of this decision, Petitioner relies on the Securities Act of 1933 as a further departure from public policy in this case. 15 USC 77C provides that certain qualified pension plans, and particularly employee stock ownership plans, are exempt from the provisions of the act. In the broadest construction of the employee stock ownership plan concerned in this litigation (Appendix E), at no time did either Plaintiff have any direct ownership of securities such that they should have a voice in the acquisition and/or sale of such securities, nor any direct rights to voting privileges of said shares. The plan administrator [2]involved in the facts of this case, in an abundance of caution and on advice of counsel[3], solicited approval of plan members for conversion of said shares to cash, pursuant to his authority as plan administrator. Such solicitation was at best gratuitous, and therefore, could not form the basis of any fraud. Furthermore, the Securities Act of 1933 and subsequent case law provides that punitive damages are not recoverable for violations of this subchapter and the Securites Exchange Act of 1934, Section 78N et seq., except on proper showing of actual malice. *Burkhart v. Allison Realty Trust*, (D.C. ILL. 1973) 363 F. Supp. 1286; *Nagel v. Prescott and Co.*, (D.C. Ohio 1964)36 F.R.D. 445; *Gridley v. Sayre and Fisher Col*, (D.C.S.D. 1976) 409 F. Supp. 1266"

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[2]*An action is pending in U.S.D.C., N.D. of AL, styled Larry D. Ellison, etc. v. Vernon Hardy and Gail Coffman, CV 85 HM 5251 NE, to require defendants accept benefits due them under the Employee Stock Ownership Plan.*

[3]*Not any counsel of record in this case.*

Review of this decision from Alabama is further justified on the basis of an exception, that should this judgment be allowed to stand it establishes bad precedent as it runs afoul of Federal substantive law. Petitioner asserts that the Supreme Court of Alabama recognized the federal authority of ERISA and its preclusion of punitive damages as recently as 1984 in the case *Hood v. Prudential Insurance Company of America, et al*, 467 So. 2d 1227 (Alabama 1984). (See also, *Whittaker v. Texaco, Inc.*, 566 F. Supp. 748)

This Court has issued a pervasive statement with regard to the broad scope of the preemption provisions of Section 514 of ERISA. In *Shaw v. Delta Airlines, Inc.*, 77L.ED. 2d 490, 501, the Court stated:

> "To interpret 514(a) to preempt only state laws specifically designed to effect employee benefits would be to ignore the remainder of 514. It would have been unnecessary to exempt generally applicable state criminal statutes from preemption in 514(b), for example, if 514(a) applied to state laws dealing specifically with ERISA plans.
>
> "Nor, given the legislative history can 514(a) be interpreted to preempt only state laws dealing with the subject matters covered by ERISA -- reporting, disclosure, fiduciary responsibility, and the like. ERISA originally contained a limited preemtion clause, applicable to only state laws relating to specific subjects covered by ERISA. The conference committee rejected these provisions in favor of the present language, and indicated that the sections preemptive scope is as broad as its language."

As the Court in *Dependahl v. Falstaff Brewing Corp.*, (653 F. 2d 1208 8th Cir. 1981), stated:

> "If Congress has already provided a remedy for the violation of the former executives' possessive benefit plans, then once Congress has expressed its intention to occupy the field, the state law is preempted, regardless of whether or not a conflict exists which involves a direct interference by the state law with the substantive Federal legislation . . . . Congress has preempted state law claims of tortious interference with employee benefit plans." (653 F. 2d at 1215-1216).

In the case *Ogden v. Michigan Bell Telephone Company, etc.*, 571 F. Supp. 520 (1983), the court held specifically that common law fraud findings were preempted by ERISA where Congress unambiguously indicated its intent to "occupy the field". The discussion found at 522 and 523, Part D, Count 3 -Common Law Fraud, clearly articulates existing case law relative to the preemption provisions of ERISA, and specifically as preemption applies to common law fraud.

In the case of *Deaver v. J. Mayhan Motor Company*, 43 S.W. 2d 199, the Supreme Court of Tennessee held that a party's rights must be adjudicated by the Supreme Court pursuant to written contract repudiating prior representations, notwithstanding the failure to object to previous parol representations, and that courts below found that representations were made.

In the prospectus gratuitously distributed for solicitation of proxy made the basis of Plaintiffs' claim in this case, we find on Page 2 therein the following:

> *"No person is authorized to give any information or to make any representation not contained in this proxy statement in connection with the solicitation made hereby, and if given or made, such information or representation must not be relied upon as having been authorized by the company or EAC.* This proxy statement does not constitute an offer to sell or a solicitation of an offer to purchase, any securitites, or the solicitation of a proxy, in any jurisdiction in which, or to any person to who, it is unlawful to make such offer or solicitation. Neither the delivery of this proxy statement nor any distribution of the securitites made hereunder shall, under any circumstances, create any inference that there has not been any change in the affairs of the company since the date herein." (Emphasis supplied)

Plaintiffs contend, and the Jury agreed, that representations made by third parties relative to their financial benefit to be realized on accomplishment of the merger of Empire, Inc. with

another company, caused them to vote favorably for said merger, and that such representations were subsequently learned to be untrue. Specifically, the representations made were that Plaintiffs would receive certain amounts of cash and debentures in the event of successful completion of the merger. Assuming Plaintiffs contentions are true, the very terms of the Employee Stock Ownership Plan, (Appendix E), which is a qualified plan under ERISA, clearly indicate the conditions precedent to receipt of benefits by plan participants under the plan. Further, the prospectus, which is not appended to this application,[4] contains the following discussions relative to the minority stock interest in Empire, Inc. held by the plan:

> "Upon consumation of the merger, each of the 141,826 shares of common stock held in the company's Employee Stock Ownership Plan (the "plan") will be converted into the right to receive $22.00 in cash and $9.00 principal amount of new debentures. The assets held by the plan after the merger will not be distributed to participants in the plan. Instead, the surviving corporation will cause the plan to become a qualified profit sharing plan, and the cash and new debentures received in the merger will become the assets of the new plan. The interests of participants in the plan will be properly reflected as participating interests in the new plan. It is not anticipated that participants in the plan will realize income as a result of the cash and new debentures being paid for shares of common stock held by the plan or the conversion of the plan into a profit sharing plan. See "Federal Income Tax consequences of the merger to the company's shareholders." "(Empire Inc. Proxy Statement — Prospectus, page 39.)

> "Section 5.16. Employee Benefit Plans. Schedule 5.16 lists all employee pension benefit plans and employee welfare benefit plans of Empire and the Empire Subsidiaries subject to the Employee Retirement Income Security Act of 1974, as in effect from time to time ("ERISA") (all such plans are hereinafter

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[4]*The prospectus contains 140 pages of printed material and is a trial exhibit contained in the record as filed with the Supreme Court of Alabama.*

> sometimes referred to as the "Plans"). As of the date hereof neither Empire nor any of the Empire Subsidiaries has any unfunded pension liability for the employee pension benefit plans maintained by Empire and the Empire Subsidiaries disclosed in Schedule 5.16. To the best knowledge of Empire's officers and directors, all reporting and disclosure requirements of ERISA with respect to the Plans have been complied with in a complete and timely manner. Empire has in force outside bonding for each fiduciary who is required to be bonded with respect to any Plan pursuant to Section 412 of ERISA. To the best knowledge of Empire's officers and directors, only the Employee Stock Ownership Plan disclosed on Schedule 5.15 is currently under audit by the Department of Labor and neither Empire nor any Empire Subsidiary nor any Empire affiliate, director, officer or employee has, with respect to any Plan, engaged in any "prohibited transaction," (sic) as such term is defined in Section 406 of ERISA. No Plan has been terminated nor has there ocurred any "reportable event," (sic) as that term is defined in Section 4043 of ERISA, with respect to any Plan since the effective date of ERISA. All premiums payable to the Pensions Benefit Guaranty Corporation with respect to the Plans to date have been paid. Other than routine claims for benefits under the Plans in the ordinary course of business, there are no actions, suits, or claims pending or, to the knowledge of Empire's officers and directors and except as disclosed to Exco, threatened against any Plan or any of its assets, and Empire's officers and directors have no knowledge of any facts which, in their opinion, could give rise to any such actions, suits or claims. (Ibid, Exhibit 1, p. 10.)

CONCLUSION

These Judgments and the opinion of the Supreme Court of Alabama, if allowed to stand, establish bad precedent in a near void body of case law. For this reason, and the fact that the law is well settled that these objections are allowed for the first time on certiorari as exceptions involving grave public policy and federal substantive law, the Petition for Writ of Certiorari is due to be granted.

Respectfully submitted,

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Appendices

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APPENDIX A

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

Empiregas, Inc. of Ardmore

84-834 v.

Vernon Hardy

Empiregas, Inc. of Ardmore

83-1102 v.

Linda Gail Coffman

Appeals from Limestone Circuit Court

MADDOX, JUSTICE.

Defendant Empiregas of Ardmore appeals from judgements based on adverse jury verdicts rendered in these two cases, which were consolidated for trial. The jury found that Empiregas wrongfully interfered with plaintiffs' employment opportunities. The jury found that Empiregas fraudulently induced plaintiffs Linda Gail Coffman and Vernon Hardy into signing employment contracts with non-competition clauses in them, and that, therefore, Empiregas could not legally assert against plaintiffs the covenants not to compete contained in those contracts. The jury further found that Empiregas was liable for fraud because it concealed material information from plaintiffs. We affirm.

Empiregas hired Hardy on November 16, 1971, and Coffman on September 1, 1972, to work in its Ardmore plant. Empiregas, a subsidiary of Empire, Inc., in Lebanon, Missouri, retails liquified petroleum gas in north Alabama. Plaintiffs' contracts with Empiregas contained covenants not to compete that prohibited plaintiffs, upon termination with Empiregas, from seeking employment with any other liquified petroleum gas company within a fifty-mile radius of Ardmore for a period of three years. Empiregas required plaintiffs to sign new contracts each year. All of these contracts contained the same noncompetition provision.

After working for Empiregas for ten years, plaintiffs acquired fully vested interests in shares of Empire, Inc., stock as part of an employee stock ownership incentive plan. On December 6, 1982, Empire, Inc., and Exco Acquisition Corporation entered into an agreement and plan of merger. Under this agreement, the employees' stock in the incentive plan was to be sold and replaced with cash and a debenture due after the year 2000.

In February 1983, Paul Stallman, an agent of Empiregas, informed plaintiffs of a meeting on the merger, and asked them to return the proxy cards they would receive and to vote in favor of the merger. Stallman informed them that if the shareholders approved the merger, each employee would receive $20.00 for each share he owned "within sixty days." However, the merger agreement itself stated that no employee could receive any cash from the sale of his stock until after his termination or retirement. In May 1983, plaintiffs received the proxy cards and a statement setting out the conditions of the merger. This statement, however, only reflected that, upon finalizing the merger, the shareholders would receive instructions as to how to claim the cash to be received for their shares. This notice did not reflect the fact that no employee would be paid until his retirement or termination, as called for by the merger agreement. Plaintiffs returned the proxy cards and voted in favor of the merger. Plaintiffs never received the money they were promised, even after requesting their share after being terminated.

Plaintiffs signed their last employment contracts with Empiregas in April 1983. At the time of signing, plaintiffs were informed by an Empiregas agent, just as they had been each time they signed the earlier contracts with Empiregas, that the covenant not to compete was "not worth a damn," that the contract was "just a piece of paper," and that "it won't hold up in court."

In May 1983, plaintiffs sought other employment, and contacted J & J Oil Co. in Ardmore. Plaintiffs received prospective employment with Sisco Gas, J & J's plant in Huntsville. Sisco Gas is within the fifty-mile radius of

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Ardmore, but does not directly compete with Empiregas. Upon learning of the prospective employment, Empiregas wrote J & J and informed it of plaintiffs' covenant not to compete with Empiregas for three years. Empiregas threatened to sue J & J if it hired plaintiffs. Based on this letter, J & J decided not to hire plaintiffs.

Plaintiffs sued Empiregas and Empire, Inc., alleging wrongful interference with employment opportunities, alleging that defendants fraudulently induced them to sign the employment contracts, and alleging that material information concerning the employee stock ownership plan had been concealed from them. Empire, Inc., was dismissed after showing it did no business in Alabama. Plaintiffs' actions were consolidated for trial, and proceeded against Empiregas. The jury found in favor of both plaintiffs on all counts, assessing damages for Coffman at $3,670 on the interference claim, and $29,670 on the fraud claim and for Hardy at $16,200 on the interference claim, and $70,822.15 on the fraud claim. Defendant appeals.

I

The issue central to a decision in this case is whether there was sufficient evidence to present the question of fraud to the jury. Empiregas contends that there was not enough evidence to support instructing the jury as to fraud. We disagree. There was evidence presented to support the jury verdict finding that Empiregas both fraudulently induced plaintiffs to sign employment contracts and concealed material information concerning the merger of Empire, Inc., and Exco.

The critical elements of an action for fraud under the terms of Code 1975, § 6-5-101, are: (1) a false representation; (2) concerning a material existing fact; (3) which the plaintiff relies on; (4) to his injury, regardless of whether the representations were made wilfully, recklessly, or mistakenly. *Burroughs Corp. v. Hall Affiliates, Inc.*, 423 So. 2d 1348, 1353 (Ala. 1982). We are satisfied from the record in this case that each of these elements is present and, therefore, that the trial court correctly submitted the issue of fraud to the jury. Further, it is the function of the jury "to resolve controverted issues of fact," and where evidence is conflicting the reviewing court "will not

substitute its judgement for that of the trier of facts." *Goodson v. Elba Baking Co.*, 408 So. 2d 498, 499 (Ala. 1981); *Shiver v. Waites*, 408 So. 2d 502, 504 (Ala. 1981).

Coffman testified that when she signed her last contract with Empiregas, the following transpired:

> "A Okay. When they got there, they said, 'Where is Pete and Price'? And Mr. Hardy told them that they had work to do and they had to go to Ross Poultry to work on a truck that we had put carburation on and he said, 'Well, get them here.' He said, 'We have got to get these contracts signed,' and Mr. Hardy said, 'No, leave them here and I will get them signed and we will get them back to you.' And they said, 'No, you have got to sign them today.' So, in five or ten minutes they both came in. So, they presented the new commission program very briefly, which nobody understood, and they laid these contracts out and said, 'Sign them.' And we all four refused to sign them and they said, 'You know what we have always told you. They are not worth a damn and it's just a piece of paper. We have got to have it on file before you get a pay check,' but we still refused to sign them. So, this one is not dated until April the 16th on the second page, Mr. Alexander.
>
> "Q Who told — who made the statement, 'You know what we have always told you. They are not worth a damn"?
>
> "A Mr. Bob Wooldridge did.
>
> ". . . .
>
> "Q Had that statement, in fact, been made to you before on the occassions that you would be called upon to sign one of these contract?
>
> "A I imagine that I had heard that statement eleven times because I had been working eleven years and I signed a contract every year.
>
> "Q Could you tell us some of the other persons who have made a statement such as that to you?

"A Well, I have heard Jim Acerman say it, I have hear Charles Ray Jones say it, I have heard Paul Stallman say it numerous times.

"Q Of course, you have heard Mr. Lewter say it?

"A Yes, sir.

"Q And who hired you?

"A Mr. J.O. Lewter."

Hardy testified similarly.

J. O. Lewter, a former retail and division manager for Empiregas, who hired both plaintiffs, testified:

"Q Was any statement made by you to them at the time that they signed their employment agreement?

"A Yes, sir.

"Q What did you tell them with reference to that provision in the agreement?

"A I told them it wasn't worth a damn.

"Q You told them it wasn't worth a damn?

"A Yeah.

"Q Did you, from time to time, have them sign other like agreements?

"A I did.

". . . .

"Q Were you given instructions as to what to tell these employees, Vernon Hardy and Gail Coffman?

"A Every time I was given those contracts to get signed, the regional managers over me told me to get them signed any way I had to and to do whatever I had to do to get them signed.

"Q Whatever you had to do?

"A Right. I was told to tell them, 'It ain't worth a damn.' Just anything to get it signed.

". . . .

"Tell us, Mr. Lewter, if you would, who of your superiors gave you these instructions?

"A Well, I was told by several of them. I can name off part of them. I had so many regional managers I can't think of all of them.

"Q Now, each of these that you are going to name, they were your superiors?

"A I had one who was Paul Lollis, Ron Ashcraft, Paul Pierce and Paul Stallman was the last one.

"Q Now tell us again what each one of those four told you with reference to your instructions in getting these employment agreements signed.

"A They told me, 'If you have to, tell them they ain't worth a damn just to get them signed.'

". . . .

"Q And did you do that?

"A Right. They had to be signed before they got their pay."

On this testimony, there was sufficient evidence to allow the jury to find that Empiregas fraudulently induced plaintiffs into signing employment contracts. Empiregas contends that the statements were not made, but that if they were, they pertained to matters of law, and not fact, and thus that the issue of fraud should not have been presented to the jury. In *Best v. Best*, 247 Ala. 627, 629,25 So. 2d 723, 725 (1946), this Court held:

" 'It has been said that misrepresentation or concealment as to matter of law cannot constitute remedial fraud, because everyone is presumed to know the law, and therefore cannot in legal contemplation be deceived by erroneous statements of law, and such representations are ordinarily regarded as mere expressions of opinion on which the hearer has no right to rely. Further, it has been held that a charge of fraud cannot be predicated on an

> honest error in a statement of the law. But misrepresentations involving a point of law will be held actionable misrepresentations of fact if it appears that they were so intended and understood as where they amounted to an implied assertion that facts existed which justified the conclusion of law expressed * * * *.' "

Quoting *Clayton v. Glasscock*, 221 Ala. 3, 127 So. 538 (1930).

Similarly, the Court of Civil Appeals held in *Spry Funeral Homes, Inc. v. Deaton*, 363 So. 2d 786, 789 (Ala. Civ. App. 1978), that a misrepresentation of law constituted actionable fraud where the defendant had his attorney draft a void contract and "the defendant then induced plaintiff to sign the agreement in reliance on the fact that the contract was legally binding and enforceable." In *Arkel Land Co. v. Cagle*,445 So. 2d 858 (1983), this Court found actionable fraud where an attorney acting as the agent of the defendant intentionally misled the plaintiff lessors as to the legal effect of the two mining leases in order to induce them to sign the leases.

Empiregas also contends that the misrepresentations were merely its opinion. The Court of Civil Appeals, in *Jackson Co. v. Faulkner*, 55 Ala. App. 354, 362, 315 So. 2d 591, 598 (1975), recognized that "whether a representation is an expression of opinion or a statement of fact depends upon all the circumstances of a particular case, such as the form and subject matter of the representation and the knowledge, intelligence and relation of the respective parties." However, the form of the representation as opinion or fact " 'is not in itself conclusive, and in case of doubt the question should be left to the jury.' " *Jackson Co. v. Faulkner*, 55 Ala. App. at 363, 315 So. 2d at 599, quoting *Fidelity & Cas. Co. v. J. O. Pittman Tractor Co.*, 244 Ala. 354, 13 So. 2d 669 (1943). A representation becomes a statement of fact " '[w]henever a person states a matter which might otherwise be only an opinion, not as a mere expression of his own opinion but as an existing fact material to the transaction, so that the party may reasonably treat it as a fact.' " *Jackson Co. v. Faulkner*, 55 Ala. App. at 363, 315 So. 2d at 599, quoting *Fidelity & Cas. Co., supra.*

The evidence presented at trial tended to show that agents of Empiregas told plaintiffs the non-competition provisions "were not worth a damn" in order to induce plaintiffs to sign the contracts. Further, the evidence showed that they acted under instructions from superiors. Plaintiffs testified that they would not have signed the contracts if they believed the covenants not to compete were valid., Therefore, the jury could have determined, as it did, that Empiregas fraudulently induced plaintiffs to sign the contracts.

There was also evidence to support the finding that Empiregas fraudulently concealed the effect of the merger on plaintiff's shares of stock in Empire, Inc. Hardy testified that a meeting was held with Paul Stallman in February 1983:

> "A Okay. At this particular meeting — it was at the Holiday Inn in Huntsville, Alabama, and I believe it was in the latter part of January or the first part of February and he told us at that meeting that we would be receiving, in the mail, one of these stock books along with a letter and a proxy card to vote and he said, 'We are asking everybody to vote yes for Empire to sell out. After you send that proxy card in, if you vote yes, you will receive twenty-two dollars per share for your stock within sixty days.'
>
> "Q Did you sign the card that they asked you to sign?
>
> "A Yes, sir, I did.
>
> "Q Did you receive the twenty-two dollars in cash within sixty days
>
> "A No, sir, I haven't received it yet."

Further, the 140-page prospectus regarding the merger which was mailed to the shareholders along with their proxy cards, does not mention the fact that disbursement of funds was to occur only upon the employee's retirement or termination. Only one paragraph, on page 39, reveals that the employees did not have an immediate right to the funds. That paragraph states:

"Upon consummation of the Merger, each of the 141,826 shares of Common stock held in the Company's Employee Stock Ownership Plan (the 'Plan') will be converted into the right to receive $22.00 in cash and $9.00 principle amount of New Debentures. The assets held by the Plan after the Merger will not be distributed to participants in the Plan. Instead, the Surviving Corporation will cause the Plan to become a qualified profit-sharing plan, and the cash and New Debentures received in the Merger will become the assets of the new plan. The interests of participants in the Plan will be properly reflected as participating interests in the new plan. It is not anticipated that participants in the Plan will realize income as a result of the cash and New Debentures being paid for shares of Common Stock held by the Plan or the conversion of the Plan into a profit-sharing plan."

However, Stallman testified that his understanding of the effect of the merger was different:

"A There was a question asked to me by one of my retail managers in regards to the merger and what I knew that was going on about it. I merely told them, 'I doubt if I know any more about it than you do. I do not know if it is going through or not but I will tell you what I know.' Before I got started, there was a question by somebody that asked me what was going to happen with their retirement program and the stock they had and so forth and I told them, 'I am just a dumb old farm boy from Missouri but I will try to explain it to you the best way I can.' I said, 'According to what I have been told, you will receive twenty-two dollars a share and a nine dollar debenture and this will be put back into your retirement program for when you retire or when you leave the company.' That's all I knew about it. I didn't know anything else about it."

This conflict in the testimony raised an issue for the jury to resolve. The trial court, therefore, was correct in presenting the issue of fraud to the jury.

II

Empiregas also contends that plaintiffs' theory of wrongful interference with plaintiffs' employment opportunities should not have been presented to the jury because it was merely pursuing its legal rights under the contracts. In *Polytec, Inc. v. Utah Foam Products, Inc.*, 439 So. 2d 683, 689 (Ala. 1983), this Court stated:

> "One's employment, trade, or calling is a property right, and the wrongful interference therewith is an actionable wrong. *Moving Picture Machine Op. Local No. 236 v. Cayson*, 281 Ala. 468, 205 So. 2d 222 (1967); *Bowen v. Morris*, 219 Ala. 689, 123 So. 222 (1929). '[A]n unlawful invasion of or interference with the pursuit or progress of one's trade, profession, or business is a wrong for which an action lies.' *Sparks v. McCreary*, 156 Ala. 382, 387, 47 So. 332 (1908); *Alabama Power Co. v. Thompson*, 278 Ala. 367, 178 So. 2d 525 (1965).
>
> "The question of whether defendants were justified in taking the actions interfereing with a plaintiff's business is generally for the jury to decide. *Evans v. Swaim*, 245 Ala. 641, 18 So. 2d 400 (1944). Furthermore, justification is an affirmative defense. *Sparks v. McCreary, supra;* see also, *Thompson v. Allstate Ins. Co.*, 476 F. 2d 746 (5th Cir. 1973)."

In *Thompson*, the defendant contended that the plaintiff's complaint was deficient because it did not allege that the defendant acted without justification. The Fifth Circuit Court of Appeals held:

> "Our reading of Alabama law discloses no such requirement. Instead, as we read the cases, they have consistantly held that, prima facie, a cause of action for intentional interference with another's business is established by showing: (1) an intentional act of interference and (2) some consequential harm to the plaintiff's business, *See Sparks v. McCreary, supra; Carter v. Knapp Motor Co.*, [243 Ala. 600, 11 So. 2d 383 (1943)] *Kelite Products c. Binzel*, 5 Cir. 1955, 224 F. 2d 131. Justification for interference in another's business is an affirmative defense and is no part of the plaintiff's case. It 'is enough

to allege and prove the conduct and effect, leaving the defendant to justify if he can.' *American Well Works Co. v. Layne & Bowler Co.*, 1916, 241, U.S. 257, 259, 36 S. Ct. 585, 586, 60 L. Ed. 987 (Holmes, J.)."

Thompson v. Allstate Ins. Co., 476 F. 2d at 748, (sic).

Empiregas's contention that it acted pursuant to its legal rights is evidence of its attempt to justify its actions, but is not conclusive of the issue. The burden is upon Empiregas to prove that its actions were justified. Here, the jury, having found that plaintiff's contracts with Empiregas were fraudulently induced, invalidated Empiregas's justification.

III

Empiregas also contends that it was error for the trail court to permit plaintiffs' attorney to cross-examine Larry Ellison regarding his interest in Empire, Inc.. Empiregas contends that Empire, Inc., was not the defendant in this case, and thus, that his interest was irrelevant. However, Ellison testified on direct examination that he was a senior vice president of Empire, Inc., and that his duties included administering the financial affairs of all subsidiaries of Empire, Inc., including Empiregas. Ellison testified on direct examination that he felt the merger was good for the shareholders and that he had informed them of this fact. On cross-examination, questioning revealed that the sale of Ellison's stock in Empire, Inc., resulted in a personal profit of over $440,000.

The trial court held that this line of questioning was proper because it revealed any bias Ellison might have. It is in the trial judge's discretion to determine whether facts tendingto show bias or interest should be admitted into evidence. *Osborne v. Cobb*, 410 So. 2d 396, 398 (Ala. 1982). Generally, counsel is given wide latitude to reveal any bias on the part of a witness on cross-examination. *International Union, United Automobile, Aircraft & Agricultural Implement Workers v. Russell*, 264 Ala. 456, 472, 88 So. 2d 175, 188 (1956). Ellison's personal interest in Empire, Inc., increased substantially as a result of the merger between Empire, Inc., and Exco. We feel that the trial judge did not abuse his discretion by allowing plaintiffs'counsel to question Ellison regarding his interest in

Empire, Inc., especially in light of Ellison's direct examination testimony, which opened the door for plaintiff's cross-examination.

IV

Empiregas also contends that the trial judge did not make available to counsel the written interrogatories propounded to the jury prior to final arguments, as required by Rule 49(d), Ala. R. Civ. P.

Plaintiffs' counsel strongly contests this arguement. Further, this Court will not assume error, and the burden is on the appellant "to affirmatvely demonstrate from the record that an error was committed by the trial court." *Chestnut Hills Civic Ass'n v. Dobbins*, 361 So. 2d 1043, 1044 (Ala. 1978); *Coastal Realty & Mortg., Inc. v. First Ala. Bank, N.A.*, 424 So. 2d 1315, 1317 (Ala. Civ. App. 1982). An appellate court "cannot presume the existence of facts as to which the record is silent and make it a ground for reversal." *Davis v. State ex rel. Davis*, 420 So. 2d 278, 279 (Ala. Civ. App. 1982). Appellate courts are "prisoners of the record and occurences in chambers and off the record are outside (the court's) purview unless the trial court or attorneys made certain that [the court] is privy to them." *Stephens v. Central of Georgia R.R. Co.*, 367 So. 2d 192, 194 (Ala. 1978). The trial court is presumed to have acted correctly "unless the contrary is made to appear from the record." *Johnson v. Fishbein*, 289 Ala. 328, 334, 267 So. 2d 405, 410 (1972). In order to properly preserve this question for our review, Empiregas's counsel should have objected to the giving of these interrogatories to the jury. He was presented with an opportunity to do that after the judge instructed the jury, yet he failed to do so. In *Elliott v. Elliott*, 372 So. 2d 846, 848 (Ala. 1979), this Court held in an analogous situation that where the appellant does not object to the trial court's failure to inform the attorneys of its proposed action on requested jury charges as required by Rule 51, Ala. R. Civ. P., no error is preserved for review. Here, counsel for Empiregas was presented the opportunity to state any objections he had to the charge as given, which contained the written interrogatories, at the end of the jury charge. He failed to do so. Therefore, there is nothing for this Court to review on this issue.

V

Finally, Empiregas contends that the damages are excessive because the trial court improperly instructed the jury as to awarding punitive damages and the jury did not consider plaintiffs' duty to mitigate their damages. First, Empiregas made no objection to the trial judge's charge on punitive damages; thus, any objection it may have had is waived. *Loch Ridge Construction co. v. Barra*, 291 Ala. at 320, 280 So. 2d at 751 (1973); *Wiliam Wilson Enterprises, Inc. v. Napier*, 395 So. 2d 90 (Ala. Civ. App. 1981).

As to Empiregas's claim that the jury did not properly consider the plaintiffs' duty to mitigate their damages, we note that the trial court properly charged the jury regarding that duty. Empiregas contends that the judge's instructions were ignored by the jury; however, error will not be presumed on appeal, and "a party cannot be permitted to speculate on the results of a court's instruction or claim error with regard thereto without an affirmative showing that such an instruction was ignored by the trier of fact or caused an improper verdict." *Citizens Bank v. Routh*, 351 So. 2d 594, 597 (Ala. Civ. App. 1977). We are of the opinion that no such showing has been made on the facts presented.

The judgement of the Circuit Court of Limestone County is affirmed.

AFFIRMED.

Torbert, C. J., Jones, Shores, and Houston, JJ., concur.

33555

APPENDIX B

IN THE CIRCUIT COURT
FOR LIMESTONE COUNTY, ALABAMA

085 84

LINDA GAIL COFFMAN,
PLAINTIFF,

VS. CASE NUMBER CV--83--152--J

EMPIREGAS, INC., OF
ARDMORE, A CORPORATION,
DEFENDANT,

CONSOLIDATED

VERNON HARDY,
PLAINTIFF

VS. *CASE NUMBER CV--83--153--J*

EMPIREGAS, INC., OF
ARDMORE, A CORPORATION,
DEFENDANT,

CERTIFICATE OF JUDGMENT

I, Frances H. Rogers, Clerk of the Circuit Court for Limestone County, Alabama, hereby certify that on April 20, 1984, the Plaintiff, Linda Gail Coffman, recovered of the Defendant in this cause, Empiregas, Inc., of Ardmore, a Corporation, (South Side Alabama Highway 53, Ardmore, Alabama), a judgment in the amount of THIRTY-THREE THOUSAND, THREE HUNDRED FORTY AND NO/100 ($33,340.00) DOLLARS, and the further sum of NINETY EIGHT AND 75/100 ($98.75), costs of suit, and that Jimmy E. Alexander (of the lawfirm of ALEXANDER, CORDER & PLUNK), 213 South

Jefferson, P.O. BOX 809, Athens, Alabama 35611, is Plaintiff's attorney of record in this cause.

I further certify that on said April 20, 1984, the Plaintiff, Vernon Hardy, recovered of the Defendant in this cause, Empiregas, Inc., of Ardmore, a Corporation, (South Side Alabama Highway 53, Ardmore, Alabama), a judgment in the amount of EIGHTY-SEVEN THOUSAND, TWENTY—TWO AND 15/100 ($87,020.15) DOLLARS, and the further sum of ONE HUNDRED FORTY SIX AND 75/100 ($146.75), costs of suit, and that Jimmy E. Alexander (of the lawfirm of ALEXANDER, CORDER & PLUNK), 213 South Jefferson, P.O. BOX 809, Athens, Alabama 35611, is Plaintiff's attorney of record in this cause.

GIVEN UNDER MY HAND on this the 25th day of June, 1984.

/s/ Frances H. Rogers

FRANCES H. ROGERS, CLERK

APPENDIX C

MAILING ADDRESS:
P.O. BOX 157
MONTGOMERY, ALABAMA 36101 TELEPHONE: 261-4609

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: _____
83-1102 - EMPIREGAS, INC. of Ardmore v. LINDA GAIL COFFMAN
84-834 - EMPIREGAS, INC. of Ardmore v. VERNON HARDY
_____ vs. _____
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXX Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

12/20/85
bsa

/s/ Robert G. Esdale
ROBERT G. ESDALE, CLERK
SUPREME COURT OF ALABAMA

APPENDIX D

The statatory provsions involved are reprinted here in pertinent part:

SECURITIES AND TRUST INDENTURES 15 USC § 77c

§77c. Exempted securities

(a) Except as hereinafter expressly provided, the provisions of this title [15 USC §§ 77a et seq.] shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title [enacted May 27, 1933], has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or territory, or by any public controlled or supervised by and acting as an instrumantality of the Government of the United States pursuant to authority granted by the Congress of the United States; or any certificate of deposit for any of the foregoing; or any security issued or guaranteed by any bank; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve bank; or any interest or participation in any common trust fund or similar fund maintained by a bank in its capacity as trustee, executor, administrator, or guardian; or any security which is an industrial development bond (as defined in section 103(c)(2) of the Internal Revenue Code of 1954 [26 USC §103(c)(2)] the interest on which is excludable from gross income under section 103(a)(1) of such Code [26 USC § 103(a)(1)] if, by reason of the application of paragraph (4) or (6) of section 103(c) of such Code [26 USC § 103(c)(4), (6)] (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)) [26 USC § 103(c)], paragraph (1) of such section 103(c) [26 USC § 103(c)(1)] does not apply to such security; or any interest or participation in a single or collective trust fund maintained by a bank or in a separate account maintained by

an insurance company which interest or participation is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of the Internal Revenue Code of 1954 [26 USC § 401], or (B) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of such Code [26 USC § 404(a)(2)], other than any plan described in clause (A) or (B) of this paragraph (i) the contributions under which are held in a single trust fund maintained by a bank or in a separate account maintained by an insurance company for a single employer and under which an amount in excess of the employer's contribution is allocated to the purchase of securities (other than interests or participations in the trust or separate account itself) issued by the company directly or indirectly controlling, controlled by or under common control with the employer or (ii) which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of such Code [26 USC § 401(c)(1)]. The Commission, by rules and regulations or order, shall exempt from the provisions of section 5 of this title [15 USC § 773] any interest or participation issued in connection with a stock bonus, pension, profit-sharing, or annuity plan which covers employees some or all of whom are employees within the meaning of section 401(c)(1) of the Internal Revenue Code of 1954 [26 USC § 401(c)(1)], if and to the extent that the Commission determines this to be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title [15 USC §§77a et seq.]. For purposes of this paragraph, a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank; and the term "bank" means any national bank, or any banking institution organized under the laws of any State, territory, or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or teritorial banking commission or similar offical; except that in the case of a common trust fund or similar fund, or a collective trust fund, the term "bank" has the same meaning as in the Investment Company Act 1940 [15 USC § 80a-2].

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be use for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4)Any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5)Any security issued (A) by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution, except that the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum on the face value of such security; or (B) by (i) a farmer's cooperative organization exempt from tax under section 521 of the Internal Revenue Code of 1954 [26 USC § 521], (ii) a corporation described in section 501(c)(16) of such Code [26 USC § 501(c)(16)] and exempt from tax under section 501(a) of such Code [26 USC § 501(a)], or(iii) a corporation described in section 501(c)(2) of such Code [26 USC § 501(c)(2)] which is exempt from tax under section 501(a) of such Code [26 USC § 501(a)] and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii).

(6) Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended [49 USC § 20a];

(7)Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8)Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

(9)Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10)Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by the State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11)Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(b)The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, as any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title [15 USC §§ 77a et seq.] with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $500,000.

(c)The Commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add to the securities issued by a small business investment company under the Small Business Investment Act of 1958 that the enforcement of this Act [15 USC §§ 77a et seq.] with respect to such securities is not necessary in the public interest and for the protection of investors.

§77l. Civil liabilities arising in connection with prospectuses and communications

Any person who—

(1)offers or sells a security in violation of section 5 [15 USC § 77e], or (2) offers or sells a security (whether or not exempted by the provisions of section 3 [15 USC § 77e], other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof the he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, upon the tender of such security, or for damages if he no longer owns the security.

§ 1132. Civil Enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1)by a participant or beneficiary—

(A)for the relief provided for in subsection (c) of this

section, or

(B)to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2)by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC §1109];

(3)by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title of the terms of the plan;

(4)by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC §1025(c)];

(5)except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6)by the Secretary to collect any civil penalty under subsection (i).

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions. (1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1954 [26 USC §§401(a), 403(a), 405(a)] (or with respect to which an application to so qualify has been filed and nas not been finally determined) the Secretary may exercise his authority under subsection (a)(5) respct [respect] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 USC §§1051 et seq., §§1081 et seq.] (relating to participation, vesting, and funding), only if—

(A)requested by the Secretary of the Treasury, or

(B)one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violations affects, or such enforcement

is necessary to protect, claims of participants or beneficiaries to benefits under the plan.
(2) The Secretary shall not initiate an action to enforce section 515 [29 USC §1145].

(c)Administrator's refusal to supply requested information. Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief it deems proper.

(d)Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentance, shall notify the administrator or any trustee of the plan of receipt of such service. (2) Any money judgement under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section. (2) Where an action under this title is brought in a district where the plan is

administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions. (1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2)In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USC §1145] in which a judgement in favor of the plan is awarded, the court shall award the plan—

(A)the unpaid contributions.

(B)interest on the unpaid contributions,

(C)an amount equal to the greater of—

(i)interest on the unpaid contributions, or

(ii)liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D)reasonable attorney's fes and costs of the action, to be paid by the defendant, and

(E)such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954 [26 USC §6621].

(h)Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is soley for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USC §§ 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406[29 USC § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of the Internal Revenue Code of 1854 [26 USC § 4975(f)(4)]; except that if the transaction is not correct (in such manner as the Secretary shall prescribe be regulation, which regulations shall be consistent with section 4975(f)(5) of such Code [26 USC § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USC § 4975(e)(1)].

(j)Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USC § 518(a)]), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of action against Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action required under this title, may be brought in the district court of the United States for the district where the plan has its principle office, or in the United States District Court for the District of Columbia.

APPENDIX E

EMPLOYEE'S STOCK OWNERSHIP PLAN FOR EMPLOYEES OF EMPIRE INCORPORATED AND SUBSIDIARY COMPANIES

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EMPLOYEES' STOCK OWNERSHIP PLAN

Effective July 1, 1976, Empire Incorporated adopted for the exclusive benefit of its employees, a Stock Purchase Plan and Trust. The Plan and Trust are qualified for tax exemption, as provided by Section 401 and 501(a) of Internal Revenue Code of 1954 and amendments. All assets contributed to the Plan by the Company are held in trust for the exclusive benefit of the Participants of the Plan, subject to the provisions of the Plan and Trust as follows:

CONTRIBUTIONS TO THE TRUST

Amount of Contribution

The Company will contribute to the Trust each fiscal year commencing with the fiscal year ended June 30, 1976, Company Securities or cash in such number or amount as the Board of Directors of the Company has determined. The value of such contribution shall not exceed the maximum amount deductible by the Company for such fiscal year for federal income tax purposes. Contributions are subject to the Company's right to amend or terminate the Plan and Trust.

Since the largest part of the Trust assets will be common stock of Empire Incorporated, the market value of the stock will largely determine the value of the Trust's assets and the value of each Eligible Employee's Participating Interest in the Trust's assets. Market value of stock depends upon many factors: economic conditions of the country and the world, changing investors' moods etc. However, the profitability and growth of the Company are the most important factors in the value. It is to your advantage, therefore, to develop sales, control expenses collect accounts and maximize profits.

Payment to the Trustee

The Company will pay over to or deposit with the Trustee, its contribution for each fiscal year within the time permitted by law for the filing of its federal income tax return for such fiscal year or any extension thereof.

Employee Contribution

No employee shall make any contribution to the Plan or Trust.

PARTICIPATION

Eligibility

Any employee of the Company or any subsidiary who is not a member of a collective bargaining unit shall be an Eligible employee the latter of attaining twenty-five years of age or completion of one Year of Service as an employee of the Company. A Year of Service for purposes of determining eligibility shall be computed based upon the consecutive twelve month period commencing with the employee's date of employment or anniversary thereof.

Break-in-Service

An employee shall not receive credit for a Year of Service to be applied toward eligibility under this Plan for any twelve month period during which he worked less than one thousand Hours of Service. If an employee works five hundred Hours of Service or less in any twelve month period, he is deemed to have suffered a one year Break-in-Service. Any service prior to a one year Break-in-Service will not be included until the employee has completed one full Year of Service immediately after the year during which the Break-in-Service occurred. If the number of consecutive one year Breaks-in-Service is equal to or greater than the number of Years of Service prior to the Breaks-in-Service, all prior Years of Service shall be disregarded in determining eligibility of any nonvested employee.

Entry Date

An employee who has qualified as an Eligible Employee will be enrolled in the Plan on the next July 1 or January 1, whichever occurs first after he has become eligible to participate.

An Eligible Employee, whose service with the Company has been terminated for any reason, would continue to be a participant until the vested portion of his account is distributed to him or to his beneficiary in full.

LEAVES OF ABSENCE

An employee shall not receive credit for Hours of Service with respect to either eligibility or vesting of benefits during any period of time that he is on a leave of absence from the Company. However, if the leave of absence is approved by the Company, he will be deemed to have suffered a Break-in-Service with respect to eligibility or vesting.

DETERMINATION OF INTEREST
OF ELIGIBLE EMPLOYEES

The benefits under this trust are integrated with Social Security benefits at the level of total annual compensation, as defined below, equal to the Social Security Wage Base for the calendar year commencing immediately prior to the commencement of the Plan Year for which a contribution is made. The Social Security Wage Base and rate for specific years are as follows:

		Base	Rate
1979	-	$22,900	6.13%
1980	-	25,900	6.13%
1981	-	29,700	6.65%
1982	-	32,400	6.70%

"Total annual compensation" when used mean the regular annual salary of an employee, bonuses and overtime compensation, but excludes any participating interest allocated under this plan to the employee.

As of the last day of each fiscal year of the Company the value of any amount contributed by the Company together with any forfeitures to be reallocated to the accounts of Eligible Employees will be allocated among the accounts of the Eligible Employees as follows:

Porportionately in the same ratio as each participant's total annual compensation in excess of the Social Security Wage Base, as may be in effect from year to year, bears to the aggregate of all such compensation in excess of Social Security Wage Base for all participants whose annual compensation is in excess of the Social Security Wage Base; provided, that the

maximum amount so allocated in a year to a participant will not exceed the then current social security tax rate, but in no case will it exceed 7 percent of the amount by which his annual compensation exceeds the Social Security Wage Base.

Any amount remaining after application of the preceding paragraph will be allocated proportionately in the same ratio as each participant's total annual compensation for each year bears to the total annual compensation for each year of all participants.

EXAMPLE

If the Company's contribution was $300,000 and total wages paid over and above the Social Security Wage Base in 1976 were $500,000, the allocation for this portion would be $29,250 9$500,000 x 5.85%). An individual paid $16,100 for the year would receive credit for $46.80 ($16,100 - 15,300 x 5.85%).

If total wages paid by the Company in 1976 were $10,000,000, the same individual would receive credit for an additional $435.91: $16.,100 divided by $10,000,000 x ($300,000 - $29,250) for a total of $482.71.

If all other amounts remained the same and the individual's total compensation was $9,500 instead of $16,100 he would receive credit for $257.21: $9,500 divided $10,000,000 x ($300,000 - $29,250).
See "Vesting" for actual distribution of these credits.

Contribution Limits

The annual allocation to the Plan for any Eligible Employee, consisting of Company contributions and forteitures allocated to the Eligible Employee's account for the Plan Year, will not exceed the lesser of twenty-five percent of the employee's compensation or $25,000.

Contributon at Termination

No contribution will be made for an Eligible Employee who dies, leaves the employment of the Company due to retirement or disability or otherwise terminates employment with the Company for the fiscal year in which the end of his employment occurs unless the employee is employed by the Company on the last day of the fiscal year.

EMPLOYEES' BENEFITS AND TERMINATION OF EMPLOYEES' PARTICIPATION IN THE TRUST

Participating Interest

The "Participating Interest" of each Eligible Employee will be the assets, including uninvested income, held by the Trustee in an Eligible Employee's individual account, together with any income receivable by the Trustee attributable to those assets.

Retirement

An Eligible Employee upon attaining sixty-five year of age may, at his own request, be retired and upon such retirement he shall be entitled to his Participating Interest in the Plan. In the event that an employee continues in the employment of the Company after reaching sixty-five years of age, he shall continue to participate under the Plan, provided he otherwise qualifies as an Eligible Employee.

Benefits

Upon retirement such participant shall become entitled to have his Participating Interest distributed to him. Distribution of such Participating Interest shall be solely in the stock of the Company as held by the Trustee for such employee if the employee so demands; otherwise, such distribution may be in cash. Such benefits shall be distributed or commence to be distributed not later than sixty (60) days after the close of the Plan Year in which the employee became eligible for benefits. After consulting with the Participant or his beneficiary, the Trustee shall determine the manner in which benefits are to be distributed. Benefits shall be distributed as the Plan Administrator shall determine as follows:

(1) Lump-sum distribution to the employee or his beneficiary;

(2) Equal annual installment payments over a period of ten (10) years, but in no event shall such period exceed the life expectancy of the employee. Any undistributed portion of an employee's interest shall be held separately from the general assets of the Trust and credited only with such income, gain or loss as may be attributable thereto. Income earned on the undistributed funds, if any, shall be distributed annually.

Small Benefits

The plan Administrator may adopt such procedures as it may find convenient with respect to the payment of accrued benefits to a participant whose employment is terminated where the present value of the portion of such distribution which is attributable to the Company - derived acrued benefit is not in excess of $1,750, and may at its option, have such benefits paid in a single sum cash payment. If a participant receives payment of his accrued benefit hereunder, and is then retired, service with respect to such single sum shall be disregarded for the purpose of determining his accrued benefit in the Plan; provided, however, that he may within 24 months of such re-employment elect to return to the Trust Fund such single sum. If such repayment is made, his Years of credited Service for benefit accrual prior to his termination of employment shall be restored, and the entire amount in the account balance of the participant prior to his termination of employment, including both the amount distributed and the amount forfeited, unadjusted by any subsequent gains or losses, shall be restored.

Sickness or Disability

If an Eligible Employee retires before age sixty-five for reasons of sickness, accident, or other permanent disability rendering him incapable of being gainfully employed in any occupation for which he is suited by reason of education or experience, his rights will be the same as they would be upon retirement as set forth in that paragraph heading above.

Death

If an Eligible Employee dies before reahing age sixty-five his rights will be upon retirement as set out in that paragraph heading above.

VOLUNTARY TERMINATION OF
EMPLOYMENT OR DISCHARGE

Withdrawal of Participating Interest

In the event a Participant voluntarily terminates his employment with the Company (otherwise than by retirement, sickness, disability or death) or is discharged, with or without

such forfeiture for cause will occur only if the Participant has completed fewer than ten (10) Years of Service.

Allocation of Forfeitures

The Trustee will segregate and hold the nonvested assets of any terminated Eligible Employee until he incurs a one year Break-in-Service. Except as provided in this section if the terminated Eligible Employee returns to employment with the Company prior to incurring a Break-in-Service, then such nonvested amounts including interest thereon shall not be considered a forfeiture. If the terminated Eligible Employee does not return to employment with the Company prior to incurring a Break-in-Service than (sic) all nonvested amounts held for his account and income thereon, shall be considered a forfeiture as of the last day of the Plan Year in which the one year Break-in-Service occurred and will be allocated by the Trustee in the same manner as Company contributions are allocated

Beneficiary Designation

An Eligible Employee will file with the Plan Administrator a designation, which may be changed from time to time, of one or more contingent beneficiaries to whom there shall be distributed the balance of the Participating Interest of such employee in the Trust in the event of such employee's death. In the event that no beneficiary is designated by an Eligible Employee, the balance of such employee's participating interest to which he would be entitled shall be distributed to the employee's estate.

Small Benefits

The plan Administrator may adopt such procedures as it may

Trustee's Right of First Refusal

After receipt by an Eligible Employee or beneficiary of all or any part of the benefits due him under this Plan in the form of Company Securities, such recipient will, prior to selling any such securities to any third party, or upon receipt of an offer to

purchase said securities from a third party, first offer the securities for sale to the Trustee upon the same terms and conditions as offered by or to the third party, but in no event will the price offered by the Trustee be less than fair market value. The offer to the Trustee will be made in writing and the Trustee will give written acceptance of the offer within ten days of receipt of the offer. If acceptance is not given within ten days, it will constitute a decline of acceptance of the offer. If the Trustee declines to accept the offer, the participant or his beneficiary will then off(sic) the securities to the Company in the same manner in which they were offered to the Trustee. The Company will give written notice of its acceptance within ten days of receipt of the offer, and lack of written notice by the Company will constitute a decline of acceptance of the offer.

SPENDTHRIFT PROVISION

The provisions of this Plan are intended as personal protection for the Eligible Employees. An Eligible Employee shall not have any right to assign, anticipate or hypothecate any assets held for his benefit including amounts credited to his account. The benefits under this Plan are not subject to seizure be legal process or in any way suject to the claims of the Eligible Employee's creditors, including without limitation, any liabilty for contracts, debts, torts, alimony or support of any relative. The Plan's benefits or the Trust's assets will not be considered an asset of an Eligible Employee in the event of his divorce, insolvency or bankruptcy.

MERGER, CONSOLIDATION
OR AQUISITION OF
EMPLOYER OR PLAN

In the event the Company or any subsidiary is merged, consolidated or its assets and liabilities acquired by another business entity, such successor business may at its sole option continue this Plan, terminate it in its entirety or merge it into such other benefit plan as the successor may deem desirable. However, in the event this Plan is merged or consolidated with, or the assets and liabilities transferred to, any other plan, each person who is a participant in tha Plan as of the date of such merger, consolidation or transfer will, immediately following

cause, he shall have the privilege of requesting withdrawal from the Plan of such benefits as he may be entitled to as of the end of the Plan Year in which termination or discharge occurred. In the event that the employee requests to withdraw such benefits from the Plan upon termination or discharge, he shall file with the Plan Administrator a written election to withdraw such benefits upon such form as may be prescribed by the Plan Administrator. Benefits shall be distributed within the twelve-month period following termination of employment, but in no event later than the latest of sixty (60) days after the close of the Plan Year in which the Participant attains age 65, completes ten (10) Years of Service, or terminates employment.

Vesting

A terminating employee will be entitled to that portion of the liquidated value of his Participating interest attributable to contributions by the Company as of the close of the Plan Year in which his termination or discharge occurred, determined by multiplying the employee's Years of Service with the Company times ten percent but in no event shall such interest exceed one hundred percent.

For purposes of determining vesting only, a "Year of Service" shall be a consecutive twelve month period coinciding with the Plan Year during which the employee received credit for one thousand or more Hours of Service. Years of Service for vesting shall include all Years of Service with the Company and its subsidiaries but not for any predecessor corporations.

Break-in-Service

An Eligible Employee will not receive credit for a Year of Service to be applied towards the vesting of his Participating Interest for any consecutive twelve-month period coinciding with the Plan Year in which he shall have worked less than one thousand Hours of Service. If an Eligible Employee works five hundred or less Hours of Service in any such twelve month period, he will be deemed to have suffered a one year Break-in-Service. For purposes of determining an employee's vested interest after a Break-in-Service, any employee who suffers a Break-in-Service will not receive credit for any Years of Service

before such Break-in-Service unless and until he shall complete one full Year of Service after the one year Break-in-Service, provided, that for a nonvested employee, if the number of consecutive one year Breaks-in-Service equals or is greater than the number of Years of Service prior to the first Break-in-Service, no prior Years of Service will be taken into conideration in determining the employee's vested interest after the Break-in-Service.

Years of Service after a one year Break-in-Service will not be used to recompute or determine an employee's vested interest prior to the Break-in-Service.

Withdrawal and Repayment of Vested Interest

If an Eligible Employee terminated his employment with the Company after suffering a one year Break-in-Service, he will forfeit all nonvested portions of his account and the provisions of this Plan relating to Breaks-in-Service will apply with respect to determining his eligibility and vested interest, if any.

If an employee terminated service with the Company and voluntarily withdrew his interest in the Plan and returned to the employment of the Company prior to suffering a one year Break-in-Service, he will forfeit all nonvested benefits under the Plan unless he repays the Plan the total amount of such voluntary withdrawal. Repayment must be made within two years of resumption of employment. The benefit restored to the employee shall not be less than the amount in the account of such employee, including the amount distributed together with forfeitures, unadjusted by any gains or losses after his withdrawal, but credited with interest which may have been earned on account of the segregation of such nonvested interest.

Notwithstanding anything in this Plan to the contrary, any Participant who is discharges because of admitted or judicially proven theft, fraud or other similar dishonest or illegal act toward the Company or persons employed by or associated with the Company shall forfeit all benefits otherwise payable to him under this Plan to the extent that such benefits are derived from Company contributions; provided, however, that

Designated Fiduciaries

The Plan Administrator may for the efficient operation of the Plan or Trust, designate persons other than the Named Fiduciaries to manage or advise as to the investment of the assets of the Trust or to provide or render such other advice or service to the Trust as may be deemed necessary by the Named Fiduciaries. Any such designation will be in writing, will expressly set forth all duties to be assumed by the Designated Fiduciary and will be signed by the Named Fiduciary making the designation and by the person so designated. Any person so designated may be either an individual, partnership or incorporated entity and upon designation will consent to be bound by the terms of this Plan.

Payment to the Trustee

The Trustee will have no duty to require any contributions to be made to it or to determine whether contributions delivered to it comply with the resolution of the Board of Directors providing for contribution.

Allocations

To enable the Trustee to make the Allocation provided for in the Plan the Company will supply to the trustee on or before the last day of each fiscal year in which a contribution is made, a list of the eligible employees for such year, together with complete information as to the term of employment, compensation and stockholding interest of each employee for that year.

Allocation of Investments

To the extent the contribution of the Company is other than company securities, the annual allocation of each Eligible Employee, to the extent possible, will be invested by the Trustee in whole shares of company securities. To the extent investment in whole shares is not possible, the Trustee will hold and invest such excess for the benefit of the Eligible Employee pursuant to the provisions of the Plan. If company securities are contributed by the Company, employees will be credited with fractional shares if necessary for proper allocation of the contributed securities.

that event, be titled to benefit under the merged, consolidated or transferred plan in an amount and to an extent not less than he would have been entitled to under the plan immediately prior to such consolidation, merger, or transfer if the Plan had been terminated.

EMPLOYEES' STOCK OWNERSHIP TRUST AGREEMENT TRUSTEE, PLAN ADMINISTRATOR AND DESIGNATED BENEFICIARIES

Trustee

Robert W. Plaster has been designated and consented to act as Trustee of the Trust and will receive, hold, invest, administer and distribute in accordance with provisions of the Trust, all assets of the Trust now held, together with all contributions, income or proceeds received by him after establishment of the Trust under the terms of the trust Agreement

Plan Administrator and Named Fiduciary

The Company has been designated as the Plan Administrator of the Plan and the Named Fiduciary and has consented to be bound by the provisions of the Plan and will perform the duties as set forth in the Plan. tion(sic) is made, a list of the eligible employees for such year, together with complete information as to the term of employment, compensation and stockholding interest of each employee for that year.

The sole responsibilities and obligations of the Plan Administrator are those duties expressly provided for by the Plan, those provided by law and no others unless agreed by the Plan Administrator

Multiple Obligations

Any person or group of persons may serve in more than one fiduciary capacity with respect to the Plan including service both as Trustee and Plan Administrator; provided that no fiduciary shall be deemed to be serving in more than one fiduciary capacity unless expressly agreed to in writing by the fiduciary.

Responsibility After Distribution

Whenever distribution of any Participating Interest has been made by the Trustee under this Plan, no further responsibility or obligation of any kind whatsoever shall remain upon the Trustee of the Company with regard to such Participating Interest to the employee or beneficiary whose interest was so distributed.

MISCELLANEOUS TRUST PROVIIONS

Thee are ten more pages of the Trust Agreement relating to duties, responsibilties, power, succession and other matters. A full copy of the Trust Agreement is available for any employee's inspection at the Company's main office. A very brief summary follows of the provisions of each paragraphs on those ten pages.

ARTICLE 9.1 The Trustee will receive and invest funds.
ARTICLE 9.2 The funds are to be invested in company securities to the extent possible.
ARTICLE 9.3 The Trustee is authorized to borrow funds for the Trust when necessary.
ARTICLE 9.4 The Trustee will vote the Company's securities.
ARTICLE 9.5 The Trustee will be entitled to reasonable compensation.
ARTICLE 9.6 The Company will inform the Trustee of the Employee's compensation, termination, etc.
ARTICLE 9.7 The Trustee's legal fees wil be paid by the Trust fund.
ARTICLE 9.8 Provisions for loans to Participants.
ARTICLE 10.1 The Trust will be on a fiscal year basis and will account for all contributions and benefits.
ARTICLE 10.2 The Trustee will allocate earnings to the employees' accounts and determine the fair market value of the Trust assets.
ARTICLE 10.3 Similar to Article 10.2.
ARTICLE 10.4 The Trustee will annually mail to each of the participants in the Trust a written report concerning their account.
ARTICLE 11.1 The Plan Administrator will supply the Trustee with what information he needs to handle the employee's accounts.

ARTICLE 11.2 The Plan Administrator will file the necessary reports and documents required by statutes and regulations.
ARTICLE 12.1 The Company can remove the Trustee or Plan Administrator and appoint successors.
ARTICLE 12.1 The Trustee or Plan Administrator can resign.
ARTICLE 12.3 The Company will appoint successors in the case of death or incapacity.
ARTICLE 12.4 Any successor, Trustee or Plan Administrator will have all the rights and obligations that his predecessor held.
ARTICLE 12.5 Any Designated Fiduciary can resign.
ARTICLE 13.1 The Company has the right to change or terminate the Plan and Trust.
ARTICLE 13.2 Amendments may not be retroactive.
ARTICLE 13.3 Provisions for delivery of amendments to Trustee.
ARTICLE 13.4 No amendment will give the Company any financial interest in the fund or be for any purpose other than the exclusive benefit of the employees or change the duties of the Trustee or the Plan administrator without their consent.
ARTICLE 13.5 An employee's account will become fully vested upon termination of the Plan.
ARTICLE 13.6 Continuation of Trustee's powers upon dissolution.
ARTICLE 16.1 The laws of the State of Missouri will be followed for the Trust and Plan.
ARTICLE 16.2 Invalidation of one part of the Plan shall not invalidate the entire Plan.
ARTICLE 16.3 The Plan Administrator has the authority to enforce the agreement.
ARTICLE 16.4 The Trustee may withhold payments or delivery until disputes are resolved.
ARTICLE 17.1 All claims against the Plan or Trust are to be made in writting to the Plan Administrator.
ARTICLE 17.2 The Plan Administrator will reply within sixty days.
ARTICLE 17.3 Any denial will set forth the reasons for denial.
ARTICLE 17.4 Appeals from a decision of the Plan Administrator can be made with the Trustee.

ARTICLE 17.5 Appeals from the Trustee's decisions can be made at law or in equity.
ARTICLE 18.1 The Trust is part of a qualified plan and it is tax exempt.
ARTICLE 18.2 Provisions if the Plan is not qualified or if the Plan fails to qualify.
ARTICLE 18.3 Word usage meaning.
ARTICLE 18.4 No assets of the fund will ever revert to the benefit of the Company.

DEFINITIONS

"Plan" means the Empire Incorporated Employees' Stock Ownership Plan and Trust Agreement as explained in the document.

"Trust" means the trust forming part of the Plan.

"Trustee" means the individual, firm or corporation appointed as provided by the Plan, or his successor.

"Plan Year" means the fiscal year of the Plan commencing on July 1 and ending June 30 of each year during which the Plan is in existance.

The **"Plan Administrator"** means the individual, firm or corporation appointed as provided by the Plan or any successor Plan Administrator.

"Subsidiary" means any corporation the common voting stock of which is wholly owned by Empire Incorporated.

"Company Securities" means the common stock of Empire Incorporated or such other securities issued by Empire Incorporated as the Board of Directors of Empire Incorporated may authorize investment in by the Trustee.

"Hour of Service" means any hour for which an employee of the Company or any subsidiary is directly or indirectly paid or entitled to payment, by the Company or any subsidiary for the performance of duties for the Company or for such periods as he mayb be compensated by the Company or any subidiary without actually performing duties.

"Years of Service" means a consecutive twelve-month period during which an employee received credit for one thousand or

more Hours of Service.

"Eligible Employee" means any employee of the Company or any subsidiary who has fulfilled the eligibility requirements of this Plan.

"Employee" means any employee of the Company or any subsidiary.

"Person" means any natural individual, corporation, partnership, firm or other entity.

"Named Fiduciary" shall mean the Plan Administrator.

"Participant" means any employee of the Company or any subsidiary who shall have fulfilled the eligiblity requirements of the Plan.

Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1558

In The
Supreme Court of the United States
October Term, 1985

EMPIREGAS, INC. OF ARDMORE,
Petitioner,

vs.

VERNON HARDY AND LINDA GAIL COFFMAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I. Whether this Court is without jurisdiction to review a state court judgment when the question which the Petitioner seeks to have reviewed was not properly raised or passed upon in the state court below?

II. Whether this Court is without jurisdiction to review a state court judgment because no substantial federal question is presented, when the state court judgment was decided wholly on the basis of state law and no federal question was raised or passed upon below?

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Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. § 1144(a) (1982) 1, 2, 7

STATEMENT OF THE CASE

The Respondents brought suit against their employer, the Petitioner, in the Circuit Court for Limestone County, Alabama, alleging that the Petitioner wrongfully interfered with the Respondents' employment opportunities, fraudulently induced the Respondents to sign employment contracts containing noncompetition provisions, and fraudulently concealed material information concerning the proposed merger of Empire, Inc. and Exco Acquisition Corp. The jury found in the favor of the Respondents on their claim for fraud and wrongful interference with employment opportunities. As to the Respondent, Coffman, the jury assessed damages of $3670 for wrongfully preventing her from securing employment and $29,670 for fraud (Pet. Appendix A, p. 3a). As to Respondent, Hardy, the jury assessed damages of $16,-200 for wrongfully preventing him from securing employment and $70,822.15 for fraud (Pet. Appendix A, p. 3a). The Petitioner never raised any question concerning alleged preemption of the Respondents' state law fraud claims under Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. § 1144 (a) (1982) during the trial court proceedings (Pet. 2).

On appeal to the Alabama Supreme Court, the Petitioner again failed to raise the claimed question of preemption of the Respondents' fraud claims under ERISA (Pet. 2); consequently, the Alabama Supreme Court's opinion does not mention, discuss, or decide the question of preemption under ERISA (Pet. Appendix A). The Alabama Supreme Court affirmed the trial court's judgment in favor of the Respondents. The Alabama Supreme Court simply decided this case solely on the basis of Ala-

bama law and found that the Respondents presented sufficient evidence under Alabama law to support instructing the jury as to fraud and wrongful interference with employment opportunities.

The Petitioner filed an Application for Rehearing with the Alabama Supreme Court, but still did not raise any question of preemption under ERISA. The Petitioner's Application for Rehearing was subsequently summarily denied by the Alabama Supreme Court (Pet. Appendix C). In its Petition for Writ of Certiorari to this Court, the Petitioner raised, *for the very first time,* the claimed question of preemption under ERISA.

———o———

REASONS FOR DENYING THE WRIT

I. The Question Which The Petitioner Seeks To Have Reviewed Was Not Propertly Raised Or Passed Upon By The State Courts Below.

The Petitioner in this case contends that the Respondents' state law fraud claims were preempted by Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.S. § 1144(a) (1982). The Petitioner, however, did not raise this question either in the trial court or in the Alabama Supreme Court (Pet. 2). This Court has consistently ruled that it is without jurisdiction to consider federal questions which were not raised or passed upon in the state courts. *Heath v. Alabama,* 106 S. Ct. 433, 436-437 (1985); *Webb v. Webb,* 451 U.S. 493, 495 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969).

The opinion of the Alabama Supreme Court (Pet. Appendix A), which was decided solely on the basis of

state law, does not mention, discuss, or decide any federal questions. This Court has frequently held "that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary.'" *Webb*, 451 U.S. at 495; *Street v. New York*, 394 U.S. 576, 582 (1969). The Petitioner has made no such showing in the present case; in fact, the Petitioner even expressly admits that the preemption question was never raised at any point in the state court proceedings (Pet. 2).

The Petitioner contends that it preserved the preemption issue for review by objecting to the submission of punitive damages to the jury (Pet. 2). The Petitioner, however, only objected to the submission of punitive damages to the jury on the grounds that *under Alabama law* the Petitioner's actions could not be characterized as malicious, willful or wanton. The Alabama Supreme Court, also, requires that issues be raised in the trial court and will not consider issues raised for the first time on appeal. *Green v. Taylor*, 437 So.2d 1259, 1260 (Ala. 1983); *Smiths Water Auth. v. City of Phenix City*, 436 So.2d 827, 830 (Ala. 1983).

This Court has identified "powerful policy considerations" underlying the "properly-raised-federal-question" doctrine. *Webb*, 451 U.S. at 499 and 500. First, principles of comity in our federal system "require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable

federal requirements." 451 U.S. at 499. "[D]ue regard for the appropriate relationship of this Court to state courts" requires that this Court review state court decisions only where the federal question has been properly raised below. *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 435-436 (1940).

Secondly, the requirement that federal questions be presented first in the state court system "affords the parties the opportunity to develop the record necessary for adjudicating the issue." *Webb,* 451 U.S. at 500. This Court has recognized that "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Illinois v. Gates,* 103 S.Ct. 2317, 2323 (1983) (quoting from *Cardinale,* 394 U.S. at 439).

The rule also insures "that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner." *Webb,* 451 U.S. at 500. Although state courts are not free to avoid federal questions on inadequate state grounds, "they should be given the first opportunity to consider them." *Cardinale,* 394 U.S. at 439. Finally, compliance with the rule results in a lessened workload for this Court because the state court judgment normally will be supported by an opinion "that may well obviate any reason for our giving plenary consideration to the case." *Webb,* 451 U.S. at 501.

The Petitioner's failure to raise the preemption question below in the Alabama Courts denied those courts any opportunity to consider or act on the preemption question. As a consequence, the record is devoid of any evi-

dence on the point, and there was no active search for an adequate state ground which avoids the federal question. For example, in the present case, the record contains no finding by the Alabama Courts that the employee stock ownership plan in the present case was an "employee benefit plan" within 29 U.S.C.S. § 1002 (1982) and subject to the provisions of ERISA. In fact, Petitioner never even made any such contention throughout the litigation in the trial court and the Alabama Supreme Court (Pet. 2). Respondents' compensation for their employment by Petitioner was based, in fact, on the profits of Petitioner, their employer. Such profits would naturally be adversely affected by a merger perpetrated by fraud. Respondent Hardy personally owned some Empire, Inc. stock outside the employee stock ownership plan. Thus, the merger was of interest to the Respondents for reasons completely unrelated to the employee stock ownership plan.

The Petitioner also fails to show whether the Respondents' fraud recovery was solely for the fraud perpetrated on the Respondents in connection with the merger. That is, the recovery for fraud may just as well have been for the fraud in connection with the employment contracts (See Pet. Appendix A, Page 3a). Additionally, there was never any contention in the Alabama Courts that the plan, the plan's administrator, or any of the plan's agents had any connection with the fraud.

The Petitioner contends that this Court should make an exception to the rule that federal questions be presented first in the state court system because the question involved here is the preemption of state law (Pet. 3). This Court, however, has held that it has no jurisdiction to consider whether a federal statute preempted state law

where the preemption question was not raised in the trial court or decided in the state appellate court. *Exxon Corp. v. Eagerton*, 103 S.Ct. 2296, 2300-2301 n.3 (1983). Accordingly, in the present case, this Court is without jurisdiction to consider whether the Respondents' state law fraud claims were preempted under ERISA, due to the Petitioner's complete failure to raise the preemption question in the state courts. The practical policy reasons underlying this rule, such as an inadequate record, further justify denial of the petition for writ of certiorari.

II. The Decision Of The Alabama Supreme Court Is Clearly Correct, And This Case Presents No Substantial Federal Question.

At all stages in the state court proceedings, this case has involved only the Respondents' state law claims against the Petitioner and was decided solely on the basis of state law. It it well established that this Court's jurisdiction to review a state court decision is dependent upon the presence of a federal question, and this Court has no power to review a state court decision on questions of state law. *Webb*, 451 U.S. at 494 n.1; *Henry v. State of Mississippi*, 379 U.S. 443, 447 (1965); 28 U.S.C.S. § 1257 (1977). Since the Alabama Supreme Court's decision in this case was decided wholly on the basis of state law, and the Petitioner raised no federal questions in the Alabama Courts, no federal question is present in the Alabama Supreme Court's decision, thereby precluding review by this Court.

However, even if Petitioner had properly presented the preemption question to the state courts, the Respondents' state law claims against their employer, the Peti-

tioner, were not preempted under ERISA. The trial court and the Alabama Supreme Court found that the Petitioner wrongfully interfered with the Respondents' employment opportunities, fraudulently induced the Respondents to sign employment contracts containing noncompetition provisions, and fraudulently concealed material information concerning the merger of Empire, Inc. and Exco Acquisition Corp. (Pet., Appendix A, B).

As to Respondents' claims for fraudulent concealment, the Alabama Courts found that the Petitioner fraudulently concealed the effect of the merger on the Respondents' shares of stock in Empire, Inc. to induce its employees to vote yes on their proxy cards, enabling the holder of the proxies to vote all shares in favor of the merger. Thus, the Petitioner fraudulently concealed from its employees material information concerning the merger in order to effectuate or accomplish the merger.

The Petitioner contends that the Respondents' state law claims for fraudulent concealment were preempted by Section 514(a) of ERISA, 29 U.S.C.S. § 1144(a) (1982) as relating to an "employee benefit plan" (Pet. 3-9). The record, however, contains no finding by the Alabama Supreme Court that this particular employee stock ownership plan was an "employee benefit plan" subject to the provisions of ERISA, due to the Petitioner's failure to raise the preemption issue in the state courts.

Moreover, the preemptive scope of ERISA is "neither all-encompassing [citation omitted], nor unlimited." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2702 (1985); *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984). This Court has recognized that "[s]ome state actions may affect employee benefit

plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. 2890, 2901 n.21 (1983). Additionally, this Court "must also presume that [in enacting ERISA] Congress did not intend to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2389 (1985).

The Respondents' state law fraudulent concealment claims fall into the category of state actions which impact upon ERISA employee benefit plans in too tenuous a manner to be considered as "relating to" such plans. The Respondents' claims for fraud arose from the employment relationship between the Petitioner (employer) and Respondents (employees). The Respondents alleged the violation of the Petitioner's duties as an employer, rather than the violation of duties created by an employee benefit plan.

The Petitioner as the Respondents' employer was the only defendant; neither the employee stock ownership plan nor the plan's administrator were parties to this case. The award of damages by the Alabama Courts to the Respondents on their state law fraud claims does not alter the terms of the employee stock ownership plan; the damages the Petitioner as employer would pay to the Respondents as employees for fraud would not come out of the plan's funds. *See Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358 (9th Cir. 1986).

The cases relied on by Petitioner in support of his contention that the Respondents' state law fraud claims were preempted by ERISA arose in a dissimilar context

from the present case, and thus are distinguishable from the present case. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981); *Whitaker v. Texaco, Inc.*, 566 F.Supp. 745 (N.D. Ga. 1983); and *Ogden v. Michigan Bell Telephone Co.*, 571 F.Supp. 520 (E.D. Mich. 1983). The plaintiffs in these three cases brought suit in federal court alleging breach of fiduciary duties under ERISA and attached pendent state claims, such as fraud and tortious interference, apparently to avoid ERISA's prohibition against punitive damages. The pendent state claims in these three cases clearly "related to" an employee benefit plan, and the federal courts correctly held that these claims were preempted under ERISA.

State courts, however, that have considered an employee's claim against his employer for breach of the employer's duties *as an employer* have held that the employee's state law claim was not preempted under ERISA. For example, in a case similar to the present case, *Shaver v. N.C. Monroe Constr. Co.*, 63 N.C. App. 605, 306 S.E.2d 519, 523 (1983), the court found that the employee's state law claim against his employer for fraud was not preempted by ERISA. The employer in *Shaver* had fraudulently misrepresented "the continued existence of a pension plan for the purpose of inducing Plaintiff to remain with defendant and to forego bonuses and salary increases." 306 S.E.2d at 523. The court held that the pension plan was "only incidentally or tangentially involved" in the employee's fraud claim against his employer, and ERISA did not preempt the employee's fraud claim. *Id.*

In *Shaw v. Westinghouse Electric Corp.*, 276 Pa.Super. 220, 419 A.2d 175, 179 (1980), the employer alleged that the employee's state law claim for breach of an em-

ployment contract was preempted by ERISA. According to the terms of the employee's contract, the employee would receive a pension based upon 60% of his salary, but the employer refused to pay the employee promised salary increases, thus causing him to lose bonuses and pension benefits. 419 A.2d at 179.

The court recognized that the employee's suit against the employer related solely to the employer's liability for breach of an employment contract; thus, state law was not preempted under ERISA. *Id.* at 180. The court found that, although it would have to examine the employee's present and future rights under the pension plan to determine whether the employer breached the employment contract, this determination would affect only the rights and liabilities of the parties to the action (employer and employee) towards each other; rights and liabilities under the pension plan would remain unaffected. *Id.* The court used the following example to demonstrate this point:

> "Suppose, for example, Shaw had alleged that while promising to provide him with retirement benefits equal to 60% of his base salary, Westinghouse had established a pension plan that provided retirement benefits equal to only 40% of his base salary. If Shaw sued Westinghouse in assumpsit for breach of its promise to provide retirement benefits equal to 60% of his base salary, his suit would neither directly nor indirectly relate to the pension plan established by Westinghouse. So far as the plan would be concerned, Shaw would be entitled to benefits no greater than 40% of his base salary, and so long as the plan paid that amount, Shaw would have no action against it. Shaw's only action would lie against West-

> inghouse, and that action would in no way affect his rights under the plan."

Id. at 179.

The states have a legitimate and important interest in protecting employees from fraudulent misconduct on the part of the employer arising out of the employment relationship, and an employee's claim for fraud against his employer has traditionally been within the domain of the state courts. ERISA was not meant to shield the employer's misconduct from state law where the employee seeks no relief which impinges upon the employee benefit plan. *See Cornell Mfg. Co., Inc. v. Mushlin*, 70 A.D.2d 123, 420 N.Y.S.2d 231, 236 (1979).

Thus, even if the preemption question had been properly presented to the Alabama courts, the Respondents' state law fraud claims would not have been preempted under ERISA. The Alabama Courts correctly held that the Petitioner breached its duty as an employer in fraudulently concealing material information from its employees concerning the proposed merger in order to effectuate the merger. Any alleged impact upon the employee stock ownership plan was much "too tenuous, remote, or peripheral" to justify a finding that the Respondents' fraud claims against their employer "related to" an employee benefit plan. *Shaw v. Delta Air Lines, Inc.*, 103 S.Ct. at 2901 n. 21.

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CONCLUSION

This Court is without jurisdiction to review this state court decision since the preemption question which the Petitioner seeks to have reviewed was neither raised nor passed upon by the state courts below. This state court judgment was decided solely on the basis of state law, and no substantial federal question was presented. Even if the preemption question had been properly presented, however, Respondents' fraud claims against their employer, the Petitioner, would not have been preempted under ERISA because any purported impact on the employee stock ownership plan was "too tenuous, remote, or peripheral."

Accordingly, the Petition for Certiorari should be denied.

Respectfully submitted,

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NO. 85-1558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EMPIRE GAS, INC. OF ARDMORE,
Petitioner,

v.

VERNON HARDY AND LINDA GAIL COFFMAN,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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STATUTES

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner readily admits its failure to raise the issue of preemption of state law remedies as might be allowed pursuant to the Employee Retirement Income Security Act (ERISA). However, the obvious jurisdictional conflict presented does form the basis of an allowable exception as outlined in the original Petition presented in this case. The very nature of the jury verdicts returned in the present case, based upon the evidence presented and exhibits introduced at trial, directly or indirectly decide a federal question.

The verdict returned in the Vernon Hardy case read as follows:

(1) "Was the contract in question induced by fraud? Yes.
(2) Omitted in accordance with instructions.
(3) Did the Defendant wrongfully prevent the Plaintiff from securing employment? Yes. If the answer to question 3 is yes, list the amount of damages. $10,200.00
(4) Did the Defendant commit fraud? Yes. If the answer to this question is yes, list the amount of damages. $70,822.15.

Signed: Alva L. Hamric, Forman."

A similar verdict was returned as to Plaintiff Coffman at the trial of these cases. The complaints filed by both Plaintiffs in the cases alleged, among other things, two theories of recovery based on fraud. (Pet. 1a) Clearly, a verdict returned in this form awards punitive damages based on common law fraud for actions or activities of Respondents' pension plan.

Respondents argue that the misrepresentations found to have been made were made by their employer concerning matters having to do with their employment and a purported stock interest they held in common stock of the employer. If not adequately addressed by various exhibits introduced at trial; namely, the prospectus; certainly by direct and cross examination testimony of at least two witnesses concerning the matters about which misrepresentations were found to have been made concerned only that stock interest held by the Employee Stock Ownership Plan participated in by the Respondents. In fact, the evidence revealed that the value of Respondents' interest in the Plan more than doubled as a result of the merger. Petitioner calls attention to the elements of fraud recited by the Alabama Supreme Court in its opinion. (Pet. 3a) (There was no evidence introduced at trial as to any stock interest held by either Plaintiff individually in common stock of the employer.)

The same exhibits referred to above introduced at trial contain specific, legal representations and disclosures of the existence and qualification of the Employee Stock Ownership Plan being subject to the provisions of ERISA. As such, the disposition of plan assets is a matter strictly within the purview of the plan administrator as a matter of law, and any misrepresentations about which Respondents suffered could only have been a breach of duty by the plan administrator, and in no way a breach of duty by the employer. The great weight of evidence at trial was that full and adequate disclosure as required by law of activities affecting plan assets was made to all plan participants.

Respondents inaccurately rely on a number of cases in support of their argument that ERISA does not apply in the present case. For example, the case *Dependahl vs. Falstaff Brewing Corp.*, 653 F. 2d. 1208 (1981) was clearly an attempt by the Plaintiffs in that case to maintain an action to recover punitive damages based on a fact situation concerning a

qualified plan. Petitioner respectfully calls the Court's attention to pages 1215-1217 of the opinion as reported in that case. There the Court very articulately delimiates the purpose intended by Congress by the preemption provisons of ERISA.

Further, the verdicts in this case clearly circumvent §1001 (b) of the act, which states:

> "It . . . hereby declared to be the policy of this act to protect interstate commerce and the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 USC §1001 (b) (1976)

As stated in *Dependahl, supra*, Congress clearly intended to "occupy the field" of employee benefit plans. Respondents claim that the type of fraud perpetrated on them in this case was "to tenuous, remote or peripheral...to warrant a finding that the law "relates to" the plan". *Shaw vs. Delta Airlines, Inc.*, 103 S. Ct. 2890, 2901 n.21 (1983) Petitioner respectfully suggests that Respondent's quotation here is strictly taken out of context, and that the thrust of *Shaw vs. Delta, supra*, was to, once again, clarify the intent of Congress with its passage of ERISA. The footnote quoted by Respondents in their brief is extremely ambiguous, and clearly has no bearing on the issues or facts presented in the present case.

Respondents repeatedly, and somewhat circularly, argue the untimeliness of Petitioner's assertion of the preemption provisions of ERISA. While this argument is well taken in most litigation, the facts of the present case clearly support an exception to that policy. The Supreme Court of Alabama has held that the failure of Plaintiff or trial court to add a necessary and indispensible party, and of Defendant to raise the absence

of such party in his or her pleadings, does not necessarily dispose of the issue; defect can be raised for the first time on appeal by the parties or by the Appellate court Ex Mero Motu. Further, absence of a necessary and indispensible party necessitates dismissal of cause without prejudice or a reversal with directions to allow the cause to stand over for amendment. *J.C. Jacobs Banking Co. vs. Campbell*, 406 So. 2nd. 854, 857. In that case the Court held that a necessary and indispensible party was absent from the litigation, but on application for rehearing, determined that the rights of that party were protected by another party that was present in the case. Petitioner contends here that any and all representations concerning the disposition of assets held by the Employee Stock Ownership Plan were strictly the responsibility of the plan administrator and that proper and adequate disclosure of same were made to Respondents.[1] The record as filed with the Supreme Court of Alabama contains a great deal of testimony and exhibits which clearly indicate that the subject pension plan was a qualified pension plan as defined by ERISA. ERISA not only preempts state law claims, including common law fraud claims, but establishes qualified plans as entities in and of themselves, subject to the jurisdiction of federal court. The only provision for concurring jurisdiction of state and federal courts concerning qualified plans has to do with the area of benefits, and matters relating to the integrity of plan assets is strictly reserved for federal court.

Once again, we find the Supreme Court of Alabama reserving the right to define the issues of a particular lawsuit based upon the preponderance of the evidence presented in the record. On review of the evidence in this case, the Alabama Court clearly committed error, if not based upon the pleadings, based upon the absence of a necessary party Defendant, assuming the alleged misrepresentations were not repudiated in writing, as originally set out in the petition.

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[1]Petitioner contends that the Alabama Supreme Court had judicial knowledge of ERISA and the authority to impute these issues, not necessarily just indemnify an absent indispensible or necessary party.

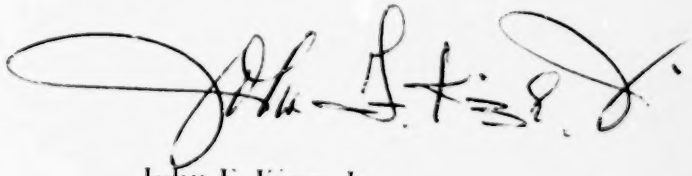
As with the *Hood* case (Pet. 6) the Alabama Supreme Court has recognized ERISA, its preemption provisions, and as shown by *J.C. Jacobs Banking Co., supra*, has further power to dispense with issues presented by the evidence.

CONCLUSION

Respondents' claim that the fraud verdict was based solely on the claim of fraudulent inducement of an employment contract is clearly erroneous from the face of the jury verdict form. Their further contention that there was no evidence of the qualification of the Employee Stock Ownership Plan pursuant to ERISA is also in direct contradiction to the record in this case.

For the reasons outlined in the original Petition to this and this reply to Respondents' Brief in Opposition, the Petition For Writ of Certiorari to the Supreme Court of Alabama is due to be granted.

Respectfully submitted,



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